Supreme Court, U.S.
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No. 00-1726

In The Supreme Court of the United States

JIM GUY TUCKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

35 pp

QUESTIONS PRESENTED

1. Whether Tucker is entitled to a new trial based on alleged juror partiality where the juror was honest during *voir dire*, was not biased against Tucker, and was not subjected to any improper communication.

2. Whether a court must presume that a juror is biased as a matter of law even though the juror was unaware that her fiance had previously been denied executive clemency by the defendant.

3. Whether a court must presume that a juror is biased where her fiance's uncle was an outspoken political critic of the defendant but where the juror herself was not interested in the uncle's views and was not influenced by them and where the juror believed that the defendant had been "a good governor."

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OPINIONS BELOW

The Eighth Circuit's opinion deciding Tucker's first appeal is reported at 137 F.3d 1016 (Pet. App. 1-46). The district court's decision after remand is reported at 36 F. Supp. 2d 1110 (Pet. App. 47-62). The Eighth Circuit's opinion in the appeal after remand, from which Tucker seeks certiorari review, is reported at 243 F.3d 499 (Pet. App. 63-81).

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Jim Guy Tucker was convicted in 1996 on charges of conspiracy and mail fraud. Alleging that a juror was biased against him, he now seeks a new trial. If the facts Tucker asserts in his Petition were true, his Petition might present a more substantial argument. But Tucker's Petition recites the facts as he alleges them, not as the district court found them. Tucker argued in the court of appeals that the district court's findings were clearly erroneous, but the court of appeals rejected that argument. Tucker has not asked this Court to review those findings, and even if he had, this Court would not do so absent some "extraordinary reason." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1982). Yet all of Tucker's arguments are based on his misrepresentation of the record.

1. On August 5, 1994, in response to then Attorney General Janet Reno's application under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as independent counsel to represent the United States in investigating whether anyone had committed federal crimes arising out of the relationships of President and Mrs. Clinton, James B. McDougal, Whitewater Development Company, Inc., Madison Guaranty Savings and Loan Association, and Capital Management Services, Inc. *See* Order, *In re Madison Guaranty Savings & Loan Association*, Div. 94-1 (D.C. Cir. [Spec. Div.] Aug. 5, 1994). On October 18, 1999, after Independent Counsel Starr resigned, the court appointed Robert W. Ray as independent counsel. Order, *In re Madison Guaranty Savings & Loan Association*, Div. 94-1 (D.C. Cir. [Spec. Div.] Oct. 18, 1999).[1]

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[1] In preparing this brief in opposition, the Independent Counsel fulfilled his statutory obligation to "consult with the Department of

2. In the mid-1980s, Tucker was a lawyer in Little Rock and was active in politics and business. *See* Pet. App. 2-3. His conviction in this case resulted from a fraudulent scheme that he perpetrated in the fall of 1985 and spring of 1986 with James and Susan McDougal, who controlled a Little Rock savings and loan, Madison Guaranty Savings and Loan Association, and David L. Hale, who was a Little Rock municipal judge who also ran a small business investment company, Capital Management Services, Inc. *See* Pet. App. 1 & 2-3. Capital Management was supposed to lend funds to disadvantaged small businesses and was financed in substantial part by the Small Business Administration. *See* Pet. App. 3.

As part of the scheme, Hale's Capital Management made fraudulent loans to designees of Tucker and James McDougal. Tucker's conviction for mail fraud relates to a $150,000 loan to Castle Sewer and Water, a company of which Tucker owned two-thirds and an associate of James McDougal owned one-third. Pet. App. 4-5. Tucker submitted a false loan application to Capital Management, disguising the purpose for which the loan would be used and misrepresenting the company's assets. Pet. App. 4-5. Castle Sewer and Water purchased the sewer and water utility located in a real estate development owned by Madison Guaranty. Pet. App. 4. The $150,000 down payment for this purchase was made with the proceeds of the loan from Capital Management, and the remainder of the purchase price was financed by Madison Guaranty. Pet. App. 4.

Justice" regarding the Department's policies "respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1). The views of the United States in this brief are consistent with the views expressed by the Department of Justice in *Boney v. United States*, No. 00-1372 (brief in opposition filed June 1, 2001) (certiorari sought where felon concealed conviction and served as juror).

3. a. The trial of Tucker and James and Susan McDougal began on March 11, 1996, and ended on May 28, 1996, with guilty verdicts returned against each defendant.[2] The trial involved the sitting governor of Arkansas and the business partners of the President of the United States; it generated substantial media attention. The district court therefore conducted a lengthy jury selection. Each prospective juror filled out a questionnaire, and the district court conducted four days of *voir dire*. During *voir dire*, Tucker's counsel asked each prospective juror to explain his or her feelings about Governor Tucker. Prospective juror Renee Johnson at first stated that she had no opinion, but when pressed, she answered "I guess he's been a good governor." Pet. App. 9. The questionnaire asked jurors whether they or any family members had been charged with a crime. Johnson answered affirmatively, but no party inquired as to the identity of the family member or otherwise questioned her response. Johnson was empanelled as one of the petit jurors.

At the conclusion of the government's case-in-chief, the Court granted a judgment of acquittal on four of the eleven counts against Governor Tucker. Pet. App. 2. The jury acquitted Governor Tucker of five of the remaining counts submitted to it, and convicted him on two counts: Count 1, which charged conspiracy in violation of 18 U.S.C. § 371,

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[2] Tucker was the defendant in another prosecution arising out of the government's investigation into Capital Management and Madison Guaranty. On June 7, 1995, a grand jury in Little Rock indicted Tucker, his lawyer, and his business partner for conspiring to impede the IRS's collection of substantial tax revenue. *See United States v. Tucker*, 78 F.3d 1313, 1316 (8th Cir. 1996) (reversing dismissal of indictment). Tucker and the other defendants eventually pleaded guilty. *See United States v. Tucker*, 217 F.3d 960, 961 (8th Cir. 2000) (remanding for further hearing on sentence of restitution).

and Count 12, which charged mail fraud in violation of 18 U.S.C. § 1341. Pet. App. 2.[3]

b. In July 1996, Tucker filed a motion for a new trial, claiming that the jury was biased. He asserted that (1) during *voir dire* Juror Renee Johnson had concealed her bias against Tucker; and (2) during the trial, Johnson had been improperly influenced by family members of her husband, Charles Hayes, whom she had married during the trial. *See* Pet. App. 15. Tucker alleged that as a state prisoner, Hayes had twice been denied executive clemency, and alleged that Hayes was the nephew of Robert "Say" McIntosh, an outspoken critic of political figures, including Governor Tucker. Say McIntosh had demonstrated against Tucker during his trial, and Say's son Tommy McIntosh had also criticized Tucker. Pet. App. 11-12 & 50.

On August 1, 1996, the district court held a brief hearing on Tucker's claims regarding juror bias, and concluded that Tucker had failed to show that Johnson was biased against him or that there had been any improper extraneous communication with the jurors.

c. In his first appeal, Tucker made two arguments that are relevant to his petition: First, he claimed that under *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548 (1984), he was entitled to a new trial, or at least a remand for a further hearing. Under *McDonough Power*, Tucker had to show that Johnson had been dishonest at *voir dire* and that had the true facts been known, she could have been struck for cause. *See* Pet. App. 16-17.[4] Second, Tucker asserted that

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[3] Tucker was sentenced to four years probation, including 18 months home confinement, $150,000 in restitution, and a $25,000 fine. (Tucker's term of probation ended on August 19, 2000.)

[4] After stating the two-part test, the Court in *McDonough Power* stated that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. Thus, the Eighth Circuit stated that a

the district court had erred by preventing him from proving that Johnson had been subject to outside influence during the trial. Pet. App. 23. The court of appeals concluded that Tucker was entitled to a full hearing on each of his claims.

4. a. On remand, the district court held a three-day evidentiary hearing. Tucker called 11 witnesses, including Renee Johnson and her husband, Charles Hayes. The district court found that Johnson had been honest during *voir dire* and found that she had not been biased against Tucker. Pet. App. 57. The district court also found that the evidence did not show that Hayes or anyone else had improperly communicated with Johnson or had tried to influence her. Pet. App. 61-62. The court thus did not address whether there was prejudice from the alleged improper communication. Also, the court found that as to the political activities of Say McIntosh, "there is no evidence that [Johnson] paid any attention to Say McIntosh's fliers or criticism of Tucker or that she was in any way influenced by his opinions." Pet. App. 57.

The evidence adduced at the hearing and the district court's findings of fact are as follows:

b. Prior to *voir dire*, each prospective juror completed a jury questionnaire. Pet. App. 48. Question 39 asked if "You or any member of your family have ever been charged with a crime?" to which Johnson answered "yes." The questionnaire then asked what the charge was, to which Johnson responded "drug conviction." Finally, the question asked how the case ended, to which Johnson answered "Guilty (serving 4 years)." *Id.* At the hearing, Johnson identified the family member to whom she had referred in Question 39 as Brian Hayes, her sister's husband. *Id.* Brian Hayes is the brother of Charles

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movant must show that the juror was biased to obtain a new trial. Pet. App. 16-17; *cf. Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) (denial of new trial where juror not actually biased).

Hayes. Johnson testified that in response to this question about family members, she had identified Brian's conviction but not Charles's because she and Charles were not married but that Brian was her brother-in-law. Pet. App. 56. In concluding that Johnson had not intentionally concealed her relationship with Charles Hayes or his family, the district court found it significant that Johnson had identified Charles's brother. Pet. App. 57.

At the time she filled out the questionnaire and at the time of *voir dire*, Johnson was living with Charles Hayes, who was the father of her three-month old daughter. Pet. App. 48. They had been engaged since 1994, but their wedding plans were not definite, and Hayes had been "holding out" on Johnson—that is, he had refused to marry her although that was her desire. Pet. App. 70. Some time in February 1996, Johnson reserved a room for a wedding reception to be held on March 9, but she did not pay the required deposit, and the reservation lapsed. Pet. App. 55-56. On March 14, 1996, the fourth day of the Tucker and McDougal trial, during the juror's lunch break, Johnson married Hayes. Pet. App. 48.

c. Before Hayes and Johnson began dating, Hayes had been in prison. In 1989, Charles Hayes, Tommy McIntosh, and Maurice Crawford, who were all cousins, were convicted in state court on cocaine charges. Hayes and Crawford were sentenced to 40 years imprisonment, while Tommy McIntosh was sentenced to 50 years. In June 1991, Hayes filed a petition with the governor of Arkansas for executive clemency. (He had also filed a petition for writ of habeas corpus in federal district court.) More than a year later, on July 20, 1992, Lieutenant Governor Tucker, as acting governor, denied Hayes's clemency petition. *See* Pet. App. 49.[5]

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[5] Tucker was acting governor because Governor William Jefferson Clinton was outside the state campaigning for the presidency.

Shortly after his clemency petition was denied, on August 7, 1992, a federal magistrate judge granted Hayes's petition for a writ of habeas corpus, finding that Hayes's counsel had a conflict of interest that Hayes had not knowingly waived. The state appealed, and Hayes remained incarcerated until April 28, 1993, after the Eighth Circuit affirmed the grant of the writ and the state decided not to retry Hayes. *See* Pet. App. 52 n.7; *Hayes v. Lockhart*, 989 F.2d 505, 1993 WL 91269 (8th Cir. 1993) (unpublished).

d. In January 1993, shortly before the Eighth Circuit affirmed the grant of the writ, Hayes, Tommy McIntosh, and Crawford again sought executive clemency. Pet. App. 49. By this time, Tucker was the governor, having assumed that position after Governor Clinton resigned to assume the presidency. While Governor Tucker was in Washington, D.C., attending President Clinton's inauguration, state Senator Jerry Jewell was acting governor. William Walker, a member of the Arkansas legislature, advocated clemency for the three men, and Jewell commuted Tommy McIntosh's sentence to time served. Pet. App. 49. Tucker's staff prevented Jewell from granting clemency to others by informing him that a sentence could not be commuted if the files were not in his office. Pet. App. 50.

Walker told Hayes that he had not had his sentence commuted because Tucker's chief of staff did not make the file available. Pet. App. 50. According to Walker, Hayes was upset by this, and thought it was unfair. Pet. App. 50. The district court found that Walker's assertions on this point were "somewhat suspect" because the details of his testimony were inconsistent with other assertions. Pet. App. 58 n.12. The district court also noted that Walker's political and business associations with Tucker, as well as the government's questioning of him regarding Castle Sewer and Water during the investigation, indicated that Walker was not a "completely disinterested witness." Pet. App. 58 n.12.

Hayes, on the other hand, testified that he had not expected to receive clemency and that he had no animosity toward the person who had denied him clemency. Pet. App. 53. Most important, Johnson and Hayes testified that they did not discuss Hayes's incarceration or his efforts to obtain release. Both stated that Hayes never expressed to Johnson any ill feelings toward Tucker. The district court found this testimony credible. Pet. App. 53-54.

e. In the affidavit that he submitted after the trial, William Walker asserted that Hayes had stated to him that Hayes and Johnson had discussed the trial *during the trial*. Pet. App. 11. At the hearing on remand, however, Walker admitted that the statement "during the trial" was added to the affidavit in response to questioning by Tucker or Tucker's counsel. Pet. App. 60 & n.13. Walker stated that he could not remember whether he had heard Hayes say that Hayes had discussed Tucker's trial with Johnson during the trial. Pet. App. 60. And Walker admitted that he did not know the substance of any discussion between Hayes and Johnson. Pet. App. 61.

Tommy McIntosh testified that he believed that Johnson and Hayes had discussed the substance of the proceedings during the trial. He stated, however, that he assumed that jurors routinely discuss with others the substance of a trial and that jurors would not obey a judge's instruction not to discuss a trial. Trans. at 432-34 (12/4/98 Hearing). But when asked if he would be speculating if he said Hayes and Johnson had discussed the substance of the trial, he responded, "That's all I would be doing." Trans. at 434 (12/4/98 Hearing).

Hayes and Johnson both testified that during the trial they never discussed the substance of the case. Trans. at 158 (Johnson) & 187–88 (Hayes) (12/3/98 Hearing). The district court concluded that Johnson and Hayes had not improperly discussed the proceedings during the trial. Pet. App. 61. And the district court found credible Johnson's statements that she

was not concerned with Say McIntosh's political activities. *See* Pet. App. 57.

5. In his second appeal, Tucker asserted that the district court's fact finding was clearly erroneous, principally arguing that the court erred in finding Johnson credible. *See* Pet. App. 74. Tucker argued that under the facts as the district court should have found them, he was entitled to a new trial for two reasons. First, he asserted that he satisfied the test from *McDonough Power* because Johnson had allegedly lied at *voir dire*, was biased against him, and would have been struck for cause had the truth been known. *See* Pet. App. 73. Second, Tucker asserted that Johnson and Hayes had improperly communicated during the trial and so he was entitled to a new trial under *Remmer v. United States*, 347 U.S. 227 (1954). *See* Pet. App. 79-80.

The court of appeals reviewed the district court's fact finding under the standard announced by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The court of appeals reviewed all of Tucker's challenges to the district court's fact finding and concluded that those findings were not clearly erroneous. *See* Pet. App. 77 (no dishonesty), 78 (no actual bias) & 81 (no outside influence).

The court of appeals also noted that Tucker's brief alluded to presumed juror bias, although he had developed no detailed argument regarding that issue. Pet. App. 78. The Eighth Circuit nonetheless addressed the issue and concluded that the facts here did not resemble any "extreme circumstances" suggested in Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982), such that bias could be presumed as a matter of law. Pet. App. at 78-79.[6]

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[6] It is difficult to understand Tucker's complaint that the analysis of the court of appeals on this issue was "cursory at best." Pet. at 19 n.12. Tucker apparently believes that the court of appeals was required to

ARGUMENT

The challenges that Tucker raised below involved well-settled legal tests that the court of appeals correctly found were not satisfied by the facts in this case. Tucker now raises arguments not raised below, which the lower court never addressed, and posits circuit conflicts where none exist. Moreover, the arguments in Tucker's Petition would require this Court to fashion a legal rule based on the peculiar facts of this case. Such a rule would have little or no general application. A writ for certiorari is therefore inappropriate. *See* Sup. Ct. R. 10; *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court"); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (Taft, C.J.) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.").

1. Tucker asserts that certiorari is appropriate so that this Court can resolve a conflict among the circuits regarding presumed juror bias. Pet. at 15-20. There is no conflict.

a. In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court addressed the issue of whether a juror could be presumed biased as a matter of law. This Court stated that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215. Justice O'Connor joined the

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exhaustively analyze the issue even though he had not presented it for consideration.

majority opinion, but wrote a concurrence addressing the issue of presumed juror bias:

> [I]n certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice. While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that a juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

455 U.S. at 222 (O'Connor, J., concurring).[7]

Two years later, in *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548 (1984), this Court addressed a claim similar to the one raised in this case. In a civil case, the plaintiff sought a new trial, alleging that a juror had answered a question at *voir dire* dishonestly. This Court held that in such a situation, a party is entitled to a new trial only where the party could

> first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

464 U.S. at 556.

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[7] Three justices dissented because they would have presumed bias on the facts there. 455 U.S. at 224 (Marshall, J., dissenting, joined by Brennan and Stevens, JJ.).

Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the opinion, but wrote separately to address how a party could establish juror bias in other situations. The concurring justices agreed that "the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." 464 U.S. at 556. The concurring justices also stated that without regard to whether a juror is honest or dishonest, a party may still "demonstrate actual bias, or, in exceptional circumstances, that the facts are such that bias is to be inferred." 464 U.S. at 556-57.[8]

Based on the concurring opinions in *Smith* and *McDonough Power*, the lower federal courts have often applied the "extreme situations" or "exceptional circumstances" analysis to determine whether a juror should be presumed biased as a matter of law. This analysis is obviously not susceptible to bright line rules in its application. The cases that Tucker cites in his Petition do not demonstrate that there is a conflict among the circuits but show rather that each case must be analyzed on its particular facts.

b. Tucker first asserts that there is a conflict among the circuits as to whether presumed bias may ever be asserted as grounds for a new trial. He cites only one case, *Goeders v. Hundley*, 59 F.3d 73 (8th Cir. 1995), as an example of a circuit that has held that it may not be so asserted. But in this case, the Eighth Circuit noted that its more recent decision conflicted with *Goeders*. Pet. App. 79. In *Fuller v. Bowersox*, 202 F.3d 1053, 1056 (8th Cir.), *cert. denied*, 121

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[8] Two other justices concurred in the judgment and would have applied a rule that "to be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant." 464 U.S. at 557-58 (Brennan, J., concurring, joined by Marshall, J.).

S.Ct. 489 (2000), the Eighth Circuit had held that a habeas petitioner could show bias "by proof of specific facts which show such a close connection to the facts at trial that bias is presumed." The court below declined to decide whether *Goeders* or *Fuller* was the controlling circuit precedent because it concluded that even if presumed bias were a ground for a new trial, Tucker had failed to make out such a claim: "Johnson is not related to the facts or parties of this case in a manner that approaches such an extreme situation [as described in Justice O'Connor's concurrence in *Smith*.]" Pet. App. 79.

Tucker had the benefit of the standard he is now advocating even though he did not advocate it in the court below. He did not prevail because the court of appeals concluded that he failed to satisfy the standard on the facts. Given the Eighth Circuit's most recent precedent, there is no reason to assume, as Tucker asserts, that the Eighth Circuit would in the future hold that some other litigant could not obtain a new trial by showing such exceptional circumstances. Tucker has failed to present an issue suitable for this Court's review.

c. Tucker cites several cases for the proposition that "[c]onflicts exist on the standards to be employed in determining implied bias." Pet. at 17. The apparent conflict exists only because Tucker's petition creates it by misrepresenting the holdings of the cases that he cites.

Contrary to Tucker's assertion, Pet. at 17, the courts do not differ over whether juror dishonesty is a factor in the presumed bias analysis. Rather, the lower courts have all recognized that, depending on the facts of the case, dishonesty may or may not be a factor. *See United States v. Masiarczyk*, 243 F.3d 543, 2001 WL 30066, *8 (4th Cir. 2001) (unpublished) (even if litigant cannot show a dishonest answer, "'it remains within the trial court's option, in determining whether a jury was biased, to order a post-trial

hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias can be inferred.'") (quoting *Fitzgerald v. Greene*, 150 F.3d 357, 362-63 (4th Cir. 1998)); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) ("[the juror's] dishonesty, of itself, is evidence of bias"); *Hunley v. Godinez*, 975 F.2d 316, 320 (7th Cir. 1992) ("While the juror's intentional concealment was a factor in the *voir dire* cases, the critical inquiry was whether the juror had a connection with the case in which the potential for substantial emotional involvement, adversely affecting impartiality[,] was inherent.") (internal quotation omitted). Contrary to Tucker's assertion that the lower courts disagree on the proper legal analysis, in truth the courts have correctly recognized that "each case must turn on its own facts." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring). There is no conflict.

Tucker also misrepresents the prior case law in an attempt to show a conflict among the courts of appeals as to the relation between the implied bias analysis and the *McDonough Power* test. Pet. at 17. Tucker cites only two cases: *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984), and *Skaggs v. Otis Elevator Co.*, 164 F.3d 511 (10th Cir. 1998), *cert. denied*, 528 U.S. 811 (1999). In *Perkins*, in analyzing the second prong of the *McDonough Power* test, the court of appeals stated that "Actual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.'" 748 F.2d at 1532 (quoting *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)). The *Skaggs* court analyzed its own prior case law where it had recited the rule using language identical to that in *Perkins*, and concluded that the prior statement of the rule was somewhat confusing, but that there was no conflict. *See* 164 F.3d at 516 n.3. Tucker has not demonstrated why this Court is required to resolve a conflict that the court of appeals has concluded does not exist.

d. Tucker also misrepresents a supposed conflict regarding the scope of the exceptional circumstances analysis. He asserts that the Eighth Circuit in this case held that exceptional circumstances can be shown only where a juror is "related to [the] facts or parties of the case before the court." Pet. at 18 (internal quotation omitted). The Eighth Circuit actually held that it would not presume bias because "Johnson is not related to the facts or parties of this case in a manner that approaches such an extreme situation [as described in Justice O'Connor's concurrence in *Smith*.]" Pet. App. 79.

Tucker also asserts, Pet. at 18, that the Eighth Circuit's opinion conflicts with the analysis of the Ninth Circuit in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (*en banc*). It does not. In *Dyer*, the court granted a new trial where "the record conclusively establishe[d] that [the juror] lied, and lied repeatedly" regarding potential sources of bias. 151 F.3d at 981. In this case Johnson honestly answered questions during *voir dire* and concealed no source of bias. The different results are driven by the strikingly different facts, not by any different understanding of the law.

Moreover, this case is inappropriate for the Court's review of this issue because the Eighth Circuit correctly decided that the facts here were not so extreme that Johnson should be presumed as a matter of law to be biased against Tucker. Although Johnson's fiance had been a state prisoner who had twice had his clemency petition denied, the fiance never discussed his clemency petitions with Johnson, and never expressed any negative feelings toward Governor Tucker. And while Johnson's fiance was the nephew of an outspoken critic of political figures, including Governor Tucker, Johnson was not concerned with those opinions nor was she influenced by them. She stated that she considered Tucker to be a good governor. Contrast *Dyer*, 151 F.3d at 984 (juror's repeated perjury, including concealing that her brother had been murdered similarly to the victim in that case, "add[ed]

up to that rare case where we must presume juror bias."); *Hunley v. Godinez*, 975 F.2d at 319 (new trial ordered where evidence of guilt was weak and "the burglary [of the jurors' hotel rooms during deliberations] placed the jurors in the shoes of the victim just before she was murdered").

2. Tucker asserts that the Eighth Circuit's decision conflicts with the decisions of this Court in three ways. Tucker's first two arguments present legal claims that he did not raise below and which the court of appeals did not decide. His third argument misrepresents the record and depends on the conclusory assertion that the court of appeals failed to properly analyze whether the district court's fact finding was clearly erroneous.

a. Tucker's first argument begins with the well settled rule that "[a]ppellate review includes determining whether 'fact-finding was . . . affected by erroneous legal principles.'" Pet. at 21 (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). But with no support Tucker then leaps to the conclusion that the lower courts required him to prove his constitutional claim "beyond a reasonable doubt" and he asserts that "this case raises the constitutional question of the appropriate standard of review in juror impartiality cases." Pet. at 21. Tucker's second argument is that the court of appeals erred in "not reviewing the district court's application of any standard *de novo*." Pet. at 23.

Tucker never argued to the court of appeals that the district court had applied an improper standard nor that it should apply a standard other than clear error. Thus, the court of appeals never addressed these issues. Because these issues were not raised or addressed below, this Court should not grant certiorari to review them. *See, e.g., Youakim*, 425 U.S. at 234; *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (a question presented in petition but not raised in court of appeals is not properly before the Court); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues

are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

The court of appeals reviewed the district court's findings for clear error because Tucker had argued that the findings were clearly erroneous. The court of appeals correctly relied on *Anderson v. Bessemer City*, 470 U.S. 564 (1985), for the appropriate standard when reviewing for clear error. Tucker's reliance on *Ornealas v. United States*, 517 U.S. 690 (1996), Pet. at 24, is misplaced. In *Ornealas*, "the facts [were] not disputed." 517 U.S. at 691. This Court held that a court of appeals must review *de novo* a district court's finding of reasonable suspicion or probable cause, but then "hasten[ed] to point out that a reviewing court should take care . . . to review findings of historical fact *only for clear error* . . . ." 517 U.S. at 699 (emphasis supplied). The Eighth Circuit's decision accords fully with *Ornealas*.

b. Tucker also argues that the Eighth Circuit erred by "abjectly deferring" to the district court's fact finding. Pet. at 25. He cites three supposed errors: (1) failing to evaluate credibility under all the factors set out in *Anderson v. Bessemer City*; (2) improperly deferring to testimony prompted by leading questions; and (3) refusing to review the issues under a totality of the circumstances test.

The court of appeals properly applied the analysis from *Anderson v. Bessemer City*. The court thoroughly analyzed Tucker's challenges to the district court's findings but found them wanting. Pet. App. 73-77 & 79-81. Tucker asserts that the court of appeals failed to apply all of the *Anderson* factors, Pet. at 27, but he does not state which factor was not applied, or why, if it were applied, it would demonstrate that the district court's findings were clearly erroneous. Similarly, although Tucker argues that the court of appeals should have applied a "totality of the circumstances test," he did not make this argument below and he does not explain how such a test might have changed the outcome.

Tucker's argument regarding supposedly leading questions misrepresents the record in this case. Tucker describes the district court's decision as follows:

> The district court found credible Johnson's "testimony" that "only marriage makes a family." 36 F. Supp. 2d at 1115, App. 56. The court did not disclose in its opinion that these words were put in Johnson's mouth by the leading question of the Independent Counsel. The court also did not attempt to reconcile this finding with Johnson's testimony that she lived with Hayes and their child "as a family" and that he was closer to her at the time of *voir dire* than most members of her immediate family.

Pet. at 9-10. Tucker's Petition failed to disclose that the words "as a family" were part of his counsel's leading question. *See* Trans. at 179 (12/3/98 Hearing). To the extent that the government's question was leading, it was appropriate because it was asked on re-cross examination.

Tucker misrepresents the record by suggesting that the government rather than Johnson herself had first alluded to the significance of marriage in answering the question of who was a family member. When Tucker's counsel questioned Johnson's failure to report Charles Hayes's conviction in response to Question 39, Johnson stated: "It said family member. I said Brian. That was before I knew Charles. Me and Charles was not married. Brian was my brother-in-law." Trans. at 179 (12/3/98 Hearing). Thus, it was entirely understandable for counsel for the government subsequently to ask "Did it take a marriage to make a family in your mind?" to which Johnson responded "Yes." Trans. at 180 (12/3/98 Hearing).

Moreover, Tucker fails to acknowledge the district court's finding that "Johnson testified credibly, in the Court's opinion, that Question 39 concerned only family members and that Charles Hayes did not fall into that category because

they were not married." Pet. App. 56. This finding most clearly supports the district court's conclusion that Johnson had been honest, but Tucker's Petition does not even address it.

3. Tucker asserts that this case raises the constitutional issue of when a presumption of prejudice is triggered by improper contact with a juror. Pet. at 28 (relying on *Remmer v. United States*, 347 U.S. 227 (1954)). The district court found that there had been no improper communication with or improper influence on Johnson. Thus, the court did not have to decide whether any contact was prejudicial. The court of appeals held that this finding was not clearly erroneous, so it too never reached the issue of prejudice. Because Tucker failed to show that the alleged communications had occurred, whether such alleged communications were prejudicial is not at issue.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 2001